Supreme Court, U.S.
FILED
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No.

IN THE

Supreme Court of the United States

JOYCE E. ROWLEY

Petitioner

v.

CITY OF NORTH MYRTLE BEACH, S.C.
ET AL.

Respondents

On Petition for Writ of Certiorari
To the Fourth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

In the underlying case in District Court, Petitioner objected to Federal Magistrate Judge's Order which (1) denied certification of appeal for consolidation of two cases that also disposed of an amendment to Petitioner's original complaint and prevented her from being issued subpoenas; (2) granted an untimely motion to compel; and (3) denied timely-filed discovery motions which affected claims. The District Judge adopted the Order. Petitioner appealed to the Fourth Circuit Court of Appeals, which denied the appeal on the basis of jurisdiction.

1. Did the Fourth Circuit err in its denial of jurisdiction over appeal where Petitioner's substantive and due process rights were lost?

2. Were the Consolidation Order and subsequent ruling on subpoenas preventing Petitioner from receiving subpoenas a violation of Federal Rules of Civil Procedure Rule 45 and is pro se litigant entitled to issuance of a subpoenas from the clerk in blank under FRCP 45?

3. Is the Order granting Respondents' untimely motion to compel Petitioner's deposition a violation of Federal Rules of Civil Procedure Rule 1?

List of Parties

City of North Myrtle Beach, South Carolina;

John Smithson, City Manager
Individually and in his official capacity;

Kevin Blayton, Director of Public Works,
Individually and in his official capacity;

Cathy E. Maddock, Personal Representative for the Estate of Douglas Maddock substituted for Douglas Maddock, and Douglas Maddock, Former Director of Planning and Development
Individually and in his official capacity;

Joel A. Davis, Former Assistant City Manager,
Individually and in his former official capacity;

The Assistant City Manager and the Director of Planning & Development, in their official capacities as substituted.

Corporate Disclosure

Petitioner is not a corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

Opinions Below and References

Fourth Circuit Court of Appeals

08-1773	Opinion on Appeal	October 14, 2008
	Petition for Rehearing	November 17, 2008
	Unpublished.	
07-1906	Opinion on Appeal	December 18, 2007
	Unpublished.	

South Carolina District Court

4:06-cv-1873 and 4:07-cv-1636

Order Consolidating Cases	August 23, 2007
Order re: Subpoenas	March 18, 2008
Order re: Consolidation, Deposition & Discovery	May 30, 2008
Order by District Judge	June 25, 2008

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). Petitioner respectfully prays that a writ of certiorari issue to review the appeal to the Fourth Circuit Court of Appeals and underlying orders as needed. A timely petition for rehearing was denied on November 17, 2008 and a copy of the order denying the appeal appears in Appendix C.

STATEMENT OF CASE

Joyce Rowley, Petitioner, filed a discriminatory and retaliatory discharge suit in June 2006 against her former employers: the City of North Myrtle Beach, S.C., and four management employees who participated in the events surrounding her termination. The suit, 4:06-cv-1873, was filed in the South Carolina District Court, that Court having original jurisdiction over federal claims and by reason of diversity and value of the case. Petitioner moved to amend her claim timely in December 2006. Respondents provided written consent to the amendment two days later. The amendment included additional claims under 42 U.S.C. §1983, and under the First Amendment and Fourteenth Amendment of the Constitution.

On February 23, 2007, Petitioner filed a state tort action in the state court as required by South Carolina Code of Laws §15-78-100 for wrongful termination in violation of public policies and fraud and deceit against the same defendants. The wrongful termination claim included causes of action in the amendment as violated public policies. The state court case had

supplemental jurisdiction in the District Court, and was removed on June 12, 2007. That case, 4:07-cv-1636, was consolidated with the original case on August 23, 2007[1].

The Consolidation Order was "for all purposes" which Petitioner had argued against as a matter of law. The Order also included a footnote which disposed of the December 2006 amendment as "moot" and held pending Petitioner's request under FRCP 45 for subpoenas. Petitioner objected (Dkt. #38) and timely appealed to the Fourth Circuit Court of Appeals in September 2007 (#07-1906) on the merger of the cases, disposition of the claims in the amendment to her complaint and her inability to secure subpoenas. The Circuit Court denied the appeal as not final nor in the small class of interlocutory judgments on the basis of *Cohen v. Beneficial Industrial Loan Corporation* in an unpublished per curiam opinion December 18, 2007.

Discovery closed on February 1, 2008.

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[1]Docket numbers for filings after this date are for the 4:07-cv-1636 case as required under that Order, unless otherwise noted.

On February 6, 2008, Respondents filed a motion to extend time and a motion to compel Petitioner's deposition. Petitioner opposed the motion, noting the expiration of discovery, Local Rules of Civil Procedure governing the extension of discovery, and *Bachman v. Lowenstein*, case law on point for the district.

On March 18, 2008, the Court ordered issuance of one subpoena duces tecum[2] to Petitioner, and denied all others, stating that Petitioner must file a motion again and identify proposed persons to be subpoenaed. Petitioner timely filed objections (Dkt. No. 112).

After a motion hearing held May 8, 2008, the Court issued an order which granted the untimely motion to compel Petitioner's deposition, denied Petitioner's timely motions to compel discovery responses, and denied Petitioner's motion to amend the Consolidation Order to allow appeal. The Order held

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[2]Respondents refused to provide any documents in response to the subpoena duces tecum. Petitioner's motion to compel filed in May 2008 has not yet been ruled on.

pending a motion to dismiss and for sanctions from November 2007[3]. Petitioner timely filed objections to the May Order (Dkt. No. 144).

On June 25, 2008, the District Judge ruled solely on the objections to the May 30, 2008 Order, stating that he found no abuse of discretion or error in the Order. Petitioner appealed to the Fourth Circuit Court of Appeals on July 11, 2008 citing *Theriault v. U.S.A.* and the practical finality doctrine as the appeal was from the District Judge's Order, or in the alternative, the original appeal under the collateral order doctrine could be renewed.

On appeal, Respondents raised jurisdictional challenges, citing *Cohen*, and *MDK v. Mike's Train House.* Petitioner responded that the District Judge was not likely to reverse himself, and so the judgement was final. Also, the

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[3]In total, Respondents filed a Partial Motion to Dismiss (withdrawn), a Motion to Dismiss for Sanctions without an FRCP 37 Certificate of Conferral, a Motion for Sanctions that was served on Petitioner a month late, a second Partial Motion to Dismiss accompanying a 580-day late Answer, and the final Motion to Dismiss for Sanctions which was based on the false declaration of its Counsel.

District Court had issued a Report & Recommendations for dismissal as sanction in the interim, and so these issues would not be merged on appeal.

The Fourth Circuit Court of Appeals granted Respondents' motion to dismiss and dismissed the appeal on October 14, 2008. On October 31, 2008, the District Judge adopted the Report & Recommendation in part, granting fees and costs as sanctions, ordering dismissal if the fees and costs weren't paid, Petitioner's deposition if the fees and costs were paid, and dismissal if Petitioner did not attend a deposition. Petitioner timely filed for a rehearing which was denied by the Fourth Circuit Court of Appeals on November 17, 2008.

ARGUMENT

Question 1.

The first question centers on whether the Circuit Court had jurisdiction over a District Judge's ruling where the effect of the ruling was to dispose of rights and claims, including the right to subpoenas under the Federal Rules of Civil Procedure. The adoption of the Magistrate Judge's rulings by the District Judge was subsequently followed by the District Judge's adoption of the Report & Recommendations during the pendency of appeal, and so was final.

The Circuit Court did not comment on the finality of the Consolidation Order in the subject appeal as it had on the previous appeal, but it granted Respondents' motion to dismiss. *Cohen*, the standard for collateral order doctrine cases, uses a three-prong test to determine whether jurisdiction is appropriate: elimination of claims of right separable from and collateral to the rights in the action, which rights are too

important to be denied review, and which should not be deferred (*Cohen*, 1225,1226).

However, the interpretation of finality varies within the Circuits in part based on the controversy. For example, the Second Circuit has held that consolidation orders are judged final when an order goes beyond that which is necessary to accomplish judicial comity, and instead:

> "....constitutes an order denying the party's due process rights to prosecute his or her own separate distinct claims or defenses without having them so merged into the claims and defenses of others that irreparable injury results..."

and so is appealable under the collateral-order doctrine of finality. (*Garber v. Randall*).

Petitioner appealed on the basis that the consolidation order was a merger of two cases that had different claims with separate liabilities and remedies affecting different defendants. In response to the 2006 Complaint, Respondents had argued that individual defendants could not be held responsible for discrimination and retaliation claims under Title VII claims, yet consented in writing to the addition of 42 U.S.C. § 1983 claims

in the amendment which cured this alleged defect[4]. FRCP 15(a) is clear that an amendment is made when there is written consent by defendants. Therefore, the Consolidation Order went beyond what was necessary for the convenience of the Court, and disposed of a valid amendment with claims under 42 U.S.C. §1983 for the period of time covered by the amendment. This significantly altered the individual defendants' liability.

In effect, claims against individual defendants were eliminated arising from events occurring in the period of time between April 2004 to February 2005–the period of Respondents' retaliatory, discriminatory and due process violations leading to her termination[5]. Further, consolidated

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[4]Petitioner did not agree with that theory, and still contends that Title VII allows for actions against municipal managers who discriminate and retaliate for oppositional activity.

[5]The amendment's claims related back to the original filing date–June 26, 2006–and so include events that occurred 300 days before her termination on February 24, 2005 or between April 2004 and June 2006. State tort limitations require filing two years after the loss or notice of loss (§15-78-110). The state tort was filed just two years after Petitioner's termination in February 2005. Therefore, a gap in liability for individual defendants is created between April 2004 to February 2005 if only the second case is amended.

"for all purposes" meant that the loss of one suit will cause the loss of both.

Petitioner argues that *Garber* in the Second Circuit, *Overby v. United States Fidelity & Guaranty company* in the Fifth Circuit, *Carter v. Baltimore O.R.* in the District of Columbia, and *Cogan v. United States* and *Gillespie v. United States Steel* before this Honorable Court, are tied together by the common thread of equity that if a ruling takes away a substantial right or claim and is done in such a fashion that there is no remedy but immediate appeal, then the Circuit Court has jurisdiction under 28 U.S.C. §1291, regardless of whether an appeal meets the test of *Cohen*[6]. This concept of equitable finality during pre-trial proceedings is one that both pre-dates *Cohen* in *Cogan* and *Baltimore*, and succeeds it in time in *Overby*, *Gillespie*, and *Garber*.

Theriault, another successor, states it more clearly:

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[6]*Gillespie* provides the closest parallel where the sister and brother's state negligence claims were lost by an interlocutory order, and here claims against individual defendants were lost.

> "...the practical test of appealability is generally whether to hold the district court's decision as "not final," but merely interlocutory, and therefore unappealable, would render a party powerless to avert mischief of an unlawful order."

In *Theriault*, the refusal to release information under the Freedom of Information Act precluded a widow from prevailing in her suit in a wrongful death action against the United States Air Force. Although interlocutory, that Court relied on *Perlman v. United States* in the Southern District of New York, *Overby*, *Cobbledick*, and *Gillespie* for jurisdiction. Petitioner respectfully suggests that the Fourth Circuit Court's decision in the subject appeal is also in conflict with *Theriault*.

Likewise, Petitioner's ability to access subpoenas during discovery and since has been nullified by the determination that the Consolidation Order and subsequent order are interlocutory and therefore not appealable. As she noted to the District and Circuit Courts, witnesses were concerned with the Respondents' retaliation. A witness who had been named by Petitioner in this matter was constructively discharged. Others

told her they feared for their jobs. Petitioner noticed the Court that she was prevented from talking to her own witnesses by Respondents (Dkt. 97, 4:06-cv-1873). Subpoenas would lift the appearance of helping Petitioner or opposing Respondent, and so would allow them to testify without fear of reprisal.

But more than that, FRCP 45(c) simply states that Petitioner has the right to unfettered access to subpoenas:

> "The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service."

In South Carolina, the clerk of the court does not issue subpoenas to pro se litigants (*"Information for Pro Se Litigants"*). Instead, a motion to the Magistrate Judge is required, and the identity and purpose of the subpoena must be provided. Pro se litigants are denied the entire process by which a party serves subpoenas which might then be opposed by a motion to quash and which is then ruled on by a judge, as is the right to then appeal the judge's ruling on a motion to quash. As in the present case, the judge can simply refuse to give the

pro se party subpoenas at any time up to and including during trial.

From a sampling of district courts among all Circuits, pro se litigants' ability to secure subpoenas from the clerk in blank varies. In the First Circuit (CT), Second Circuit (E.D.N.Y.), Third Circuit (PA), Fifth Circuit (MS), Eighth Circuit (IA), Ninth Circuit (OR) and Eleventh Circuit (GA), no written prohibition exists in either local rules or separately published guides. In the Seventh Circuit, in Illinois District Court, there is a the same prohibition as in South Carolina to issuing subpoenas in blank to pro se litigants by the clerk. In the Tenth Circuit, New Mexico District Court requires only IFP litigants to show the need for the subpoena and that they can pay the cost of summons. In the Sixth Circuit, Kentucky District Court appears to allow pro se litigants subpoenas, in blank but not signed until the form is filled out. However, under that same rule attorneys must also fill out the forms prior to the clerk's signature and sealing. [(LR 4.3.(a)(4)]

In addition to intercircuit discrepancies, Petitioner has found that the District Court ruling is in conflict with at least one other District Court in the Fourth. The District Court of North Carolina does not have a written restriction prohibiting pro se litigants from receiving subpoenas.

Finally, the District Court is in conflict with the state courts in South Carolina. Had she kept her second case in the South Carolina 15th Circuit Court of Common Pleas, Petitioner would have received subpoenas in blank.

However, here, the judge is interjected into the process to determine whether Petitioner is entitled to a subpoena and takes on the role of both judge and advocate for the opposing party. The opposing party does not have to file a motion to quash and, hence, there is no appeal available. A judge can withhold subpoenas at trial as well. Nor is there jurisdictional appeal from the clerk's refusal.

In *Baltimore*, a parent case to *Overby* in the District of Columbia District Court, the Court held that an interlocutory

order on quashed subpoenas was not appealable since the petitioner could secure subpoenas at trial. Therefore, this remedy is not available to Petitioner or other pro se litigants. Petitioner's Constitutional Fourteenth Amendment rights have been abrogated without remedy of appeal.

Like *Theriault*, the Court's footnoted declaration under the guise of an interlocutory order had the effect of depriving Petitioner from shaping her case. Treating the Order as interlocutory left Petitioner with no ability to remedy this error until perhaps the end of the case. As in *Gillespie*, the cost of having to start all over again to reassert her claims against Individual Defendants should have been balanced against the potential for piecemeal review.

Theriault is also applicable to the Court's Order regarding an untimely motion to compel to depose Petitioner. The District Court ruling was inconsistent with Local Rules of Civil Procedure and case law for the District, and by effect, renders Petitioner unable to avoid "the mischief of an unlawful

order." Since a deposition cannot be "untaken," the only remedy left is to defy the order to seek relief.

In *Dow Chemical Corp. v. Taylor* in the Sixth Circuit and in *Cobbledick* before this Honorable Court, interlocutory appeal was denied because the petitioners could disobey the order and appeal the Court's contempt order. But the Circuits are split as to whether defiance-contempt will allow appeal. Civil contempt is not considered final and so not appealable in the Third, Fifth and Ninth Circuits, but is deemed as appealable in some cases in the Fifth Circuit (*Drummond Co. v. United Mine Workers*), in the Eleventh Circuit if a showing that the sanction is non-contingent (*Combs v. Ryan's Coal Co.)*, and in the Second Circuit even if sanctions haven't been imposed (*Dove v. Atlantic Capital Corp.*).

Criminal contempt cases are equally inconsistent throughout the Circuits with the Tenth Circuit requiring sentencing before deeming such appeals final and so appealable, and the Seventh Circuit considering criminal

contempt not only immediately reviewable, but also review the underlying order (*Hanley v. James McHugh Construction Co.*).

Regarding defiance-contempt for depositions, the Ninth Circuit does not regard them final (*Merino v. Hocke*), but the Second and Tenth Circuits do:

> "...To perfect standing to appeal from civil pretrial discover order, nonparty deponent must refuse to comply and submit to contempt proceeding; thereafter, adverse contempt order is final and may be appealed." *(FTC v. Alaska Land Leasing, Inc.*, 10th Cir.)

The Fourth Circuit requires defiance-contempt as a means of securing appellate jurisdiction (*North Carolina Assn. Of Black Lawyers v. North Carolina Bd of Law Examiners* in which an order denying a protective order against non-party discovery was denied appellate review). Wright & Miller notes that "A system that depends on a gamble with contempt, and for parties a gamble that contempt sanctions may be civil and not appealable, seems unprincipled."(§3914.23, p. 155)

On the surface, the third issue in the Order appealed appears to be only a discovery order, well within the realm of

the Magistrate Judge's discretion. However, the discovery included among other things, identification of which of the eleven named male employees were allowed to resign in lieu of termination to protect their careers[7], a principal component of her claim of discrimination. By preventing Petitioner from discovery on this matter, it severely impacted her ability to prove her claim of discriminatory employment practices. In essence, in this one Order, the Court denied all of Petitioner's requests for documents from the individual defendants, and all but two of the only interrogatories served on Defendant City. Again, the elements of the denial of this appeal is incongruous with *Theriault.*

It would also seem the Court is acting counter to the intent of the Civil Rights Act of 1964, as, on the whole, denial of the information under an interlocutory order prevents the

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[7]Petitioner offers by way of explanation that Defendant Davis, former Assistant City Manager, was allowed to resign after being put on personal leave, despite no fewer than pending four Title VII charges and claims against him at the time, including this one. He secured employment elsewhere within a short time making an even higher salary.

Petitioner from acquiring the evidence necessary to prove discriminatory employment practices. Coupled with the Respondents' failure to identify pre-trial disclosures in March 2008 without repercussion, the Court's position on this discovery matter is a grave concern. Since Petitioner is, in essence, enjoined to act as prosecutor for federal employment law in this matter, she should be allowed the tools necessary to do the government's job.

Cobbledick cites the need for the case to progress as a reason against allowing interlocutory appeals. Here, the lower court has not stayed any action pending the appeal. During pendency of the petition for rehearing, the District Judge adopted the Magistrate Judge's Report and Recommendations. Nor did the Circuit Court stay its mandate.

Therefore, the Fourth Circuit's decision to deny the appeal is in conflict with rulings in other circuits and this Honorable Court that allow interlocutory appeals where equity demands immediate relief. The issues raised are important

matters of law involving 14th Amendment Constitutional due process and equal protection rights, and are relevant to other pro se litigants and their claims. Finally, the proceedings in the lower court have not been in keeping with standard practices.

Question 2.

The second question posed to the Court requests the verification that any party is entitled to a subpoena en blanc issued from the clerk of the court. In fact, only the clerk is charged with issuing subpoenas, not a judge (*Estep v. U.S.*, *McGill v. Duckworth*, and *Fisher v. Marubeni Cotton Corp)*. Unfortunately, a standard of review and case law for court clerks refusing to issue subpoenas in blank does not exist. Petitioner searched Wright & Miller Federal Practice, Moore's Federal Practice, Westlaw's Federal Practice Lawyer's Edition, the Federal Rules Civil Handbook by Baicker-McKee Janssen Corr, American Jurisprudence, and Corpus Juris Secundum for references to a clerk's refusal to issue subpoenas and found

nothing. Therefore, this is a novel question to be heard by this Court.

As noted in the Argument on Question 1, there are existing intercircuit conflicts, conflicts between district courts within the Fourth Circuit, and conflicts between the District Court and the State Court of Common Pleas, which in the latter court the clerk grants subpoenas to any party requesting them.

So, in addition to the due process problems with placing a judge in the position of both jurist and adversary, the due process problems with a lack of appellate jurisdiction since there is no appeal from a court clerk, and the intercircuit conflicts, the state courts allow pro se litigants greater rights than the federal courts.

Finally, it deprives the pro se litigant of the right to shape his or her own case. Being denied access to those witnesses and documents until after a case is over poses an unreasonable financial burden of having to start over at a time when witnesses memories may have dimmed. Obviously, having

access to witnesses and documents under subpoenas affects the outcome of a case.

Question 3.

The third question is a matter of equity posed to the Court. The first rule of the Federal Rules of Civil Procedure states that the rules shall be construed and administered "to secure the just, speedy, and inexpensive determination of every action." Yet the Magistrate Judge's ruling as adopted by the District Judge allowed one party to ignore the discovery schedule, local rules, and case law by moving to extend time and to compel past the deadline. Petitioner was required to meet each and every deadline, rule and order, which she did.

According to LRCP 6.01, an extension to the discovery deadline will be granted only under extraordinary circumstances. LRCP 16.02 (D), requires discovery motions to be filed within the time set for discovery. FRCP 16, on which the Order was based, states that a failure to meet a deadline may be excused by "good reason" and if the moving party had

diligently sought discovery. Not only did the moving party's lack of diligence in the matter, Respondents' offered no reason for failure to file a motion to extend and motion to compel before the close of discovery.

Instead, the Magistrate Judge offered a reason on their behalf citing, incorrectly, Petitioner's failure to provide discovery materials. Court records are clear that Petitioner offered the materials for inspection in April 2007, to which Respondents' refused to inspect, and then Petitioner copied all relevant documents and sent them to Respondents. Despite Petitioner's repeated testimony to the Court on May 8, 2008 that she had provided all relevant documents, a follow-up letter, and two pre-trial disclosure filings in excess of 14 pages each, the Magistrate Judge gave a reason not offered by Respondents as part of their motion to compel brief or hearing testimony.

Nor was this the only time that Respondents were allowed to disobey the rules. Among the issues raised in equity

by Petitioner to the District Court were Respondents' failure to respond to interrogatories with more than a single line reply (FRCP 34, January 2007), failure to provide prior notice on issuing subpoenas resulting in the release of Petitioner's personal information to strangers (FRCP 45, September 2007), failure to certify conferral prior to seeking sanctions (FRCP 37, November 2007) which motion was the basis for the Court's drafting the Report & Recommendation in May 2008, failure to respond to a subpoena duces tecum (FRCP 45, April 2008), failure to provide pretrial disclosures (FRCP 26(a)(3), March 2008 and August 2008), and failure to answer the original complaint on behalf of Individual Defendants for 580 days after it was due (FRCP 4). Although Petitioner sought default judgement for the last two, the Court did not acknowledge her filings, nor did the clerk enter the default judgment for failure to answer as required under FRCP 55(a). The requirement that Petitioner sit for a deposition that was compelled under an untimely motion and in light of the Respondents' multiple

failures to obey the law is contrary to the just determination of this action.

Since all pro se and all pro se cases are automatically referred to federal magistrate judges in South Carolina, the need to ensure fairness applies to other pro se cases in that state. The proceedings noted above may be reviewed under R.10(c) of the Supreme Court Rules.

CONCLUSION

Petitioner seeks a writ of certiorari for review of the Fourth Circuit Court of Appeals' decision to deny her appeal. The Order by the District Judge made final the Magistrate Judge's rulings, which findings were not reviewed again in the adoption of the Report and Recommendations during pendency of the appeal.

The Consolidation Order, in particular, included dispositive rulings and a suspension on releasing subpoenas in blank to Petitioner, which suspension, continues today. The Magistrate Judge also ruled on discovery motions which have

had the effect of preventing Petitioner's timely-filed discovery important to her case, and ruled in favor of Respondents' discovery motion that was filed out of time and without reason. The latter ruling also raised the issue of courts forcing litigants into compliance or contempt, even when the ruling was clearly in error. The District Judge adopted these findings in toto.

The writ is suitable for review in that the questions posed represent the intercircuit inconsistency in appellate jurisdiction for litigants who seek redress from unlawful interlocutory orders that create finality for important and substantial claims, and for pro se litigants who seek the tools necessary to conduct and shape their cases as needed and as is just. At least one novel question is posed: whether individual district courts can lawfully devise rules and guides that prevent a pro se party from receiving subpoenas in blank signed by the Court clerk.

The need for consistency throughout the circuits is necessary to ensure that litigants have equal protection under

the laws. While the Fourth Circuit has been consistent on interlocutory orders, it is no less important to be fair. A judgment that can be upheld but never allows for adjudication on the merits of the controversy does little to promote justice.

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APPENDIX A

DECISION OF THE FOURTH CIRCUIT COURT OF APPEALS

FILED: 10/14/08
No. 08-1773

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

(4:06-cv-01873-TLW-TER; 4:07-cv-01636-TLW-TER)

JOYCE E. ROWLEY,

Plaintiff - Appellant,

v.

CITY OF NORTH MYRTLE BEACH; JOHN SMITHSON, City Manager, individually and in his representative capacity as employee of the City of North Myrtle Beach; JOEL DAVIS, Assistant City Manager, individually and in his representative capacity as employee of the City of North Myrtle Beach; KEVIN BLAYTON, Public Works Director, individually and in his official capacity as employee of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR FOR THE CITY OF NORTH MYRTLE BEACH; CATHY E. MADDOCK, Personal Representative of the Estate of Douglas Maddock,

Defendant – Appellees,

and

DOUGLAS MADDOCK, Planning and Development Director individually and in his representative capacity as employee of the City North Myrtle Beach,

Defendant.

ORDER

The Appellees move to dismiss the appeal for lack of jurisdiction. We grant the motion because the appeal is interlocutory and this court does not have jurisdiction. We deny as moot the Appellees' motion to strike. We also deny Appellant's motion to stay the district court proceedings pending the appeal. Accordingly, the appeal is dismissed.

Entered at the direction of Judge Agee, with the concurrence of Judge King and Judge Gregory.

FOR THE COURT
/s/ Patricia S. Connor
CLERK

APPENDIX B

ORDERS OF THE DISTRICT COURT OF SOUTH CAROLINA

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JOYCE E. ROWLEY, Plaintiff, -vs- CITY OF NORTH MYRTLE BEACH, and JOHN SMITHSON, JOEL DAVIS, KEVIN BLAYTON, and DOUGLAS MADDOCK, individually and in their representative capacities as employees of the City of North Myrtle Beach, Defendants.	)	Civil Action No.: 4:06-1873-TLW-TER 4:07-1636-TLW-TER ORDER

Presently before the Court are Defendants' Motions to Consolidate (Document # 107 in C/A No. 4:06-1873-TLW-TER; Document # 6 in C/A No. 4:07-1636-TLW-TER). Both cases involve the same Plaintiff and Defendants and arise out of the same set of factual circumstances. Specifically, both cases arise out of discipline Plaintiff received by her employer on October

27,2004, and her subsequent termination on February 24, 2005.

The first case was filed in this Court and asserts causes of action for retaliatory discharge in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, gender-based discriminatory discharge in violation of Title VII, gender-based discriminatory discipline in violation of Title VII, and violation of the Freedom of Information Act (FOIA). The second case was filed in the Horry County Court of Common Pleas and was subsequently removed to this Court. Plaintiff asserts causes of action for wrongful discharge in violation of public policy and fraud, deceit, and misrepresentation.

Following Defendants' removal of the second case to this Court, they filed Motions to Consolidate. Plaintiff agrees that the cases should be consolidated "for the purpose of judicial economy and efficiency in matters of discovery, hearings, and trial."

Rule 42(a) of the Federal Rules of Civil Procedure provides,

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

The two cases filed by Plaintiff involve common questions of law and fact. The undersigned finds that consolidation of the above-referenced cases is appropriate and in the best interest of judicial economy. Therefore, Defendant's Motions to Consolidate are GRANTED. The case of Rowley v. City of North Myrtle Beach, et al, C/A No. 4:07-1636-TLW-TER, shall be designated as the lead case and all future documents should be filed in that case.

IT IS SO ORDERED.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

August 23, 2007
Florence, South Carolina

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joyce E. Rowley, Plaintiff,	) Civil Action No. 4:06-1873-TLW-TER 4:07-1636-TLW-TER
-vs-	)
	) ORDER
City of North Myrtle Beach, et al.,	)
Defendants.	)

This matter is before the court on several outstanding motions.

(Petitioner's Note: Excerpted for brevity to include applicable decisions only).

5. **Plaintiff's Motion for Subpoenas** (Documents # 117 & # 121- 4:06-1873; Documents # 16 & # 20 - 4:07-1636)

Plaintiff seeks an order directing the clerk of court to issue, in blank, subpoenas duces tecum in order for her to request documents from Defendant Douglas M. Maddock (deceased), individually and in his official capacity as Director of Planning and Development. She seeks to serve the subpoena on the Defendant "in care of" Defendant City of North Myrtle

Beach, "in care of" the law firm which represents the defendants in this action, and "in care of" the deceased's widow. She seeks also to direct a subpoena to Defendant City of North Myrtle Beach. In each subpoena she intends to seek records "[F]or any and all documents and other tangible things held by the deceased Defendant Douglas M. Maddock, individually and/or as in his official capacity as Director of Planning and Development which relate to the above cases."

The parties dispute whether or not one party to a lawsuit may subpoena documents from another party pursuant to Rule 45, Fed.R.Civ.P., or whether a party is limited to the use of Rule 34, Fed.R.Civ.P., to obtain documents from another party. The undersigned finds the authority cited by the plaintiff more persuasive. *See Mortgage Info. Services, Inc. v. Kitchens, et al.*, 210 F.R.D. 562, 564-66 (W.D.N.C. 2002). However, a complete reading of *Kitchens* reveals an important limitation:

> "traditional canon of interpretation regarding the interaction between the various Federal Rules of Civil Procedure . . . require that the rules be construed in a manner that is internally consistent. . . ." *Id.* at 566-67.

> Also, use of Rule 45 should not be allowed to circumvent Rule 34. *Joiner v. Choicepoint Services, Inc.*, 2006 WL 2669370 (W.D.N.C. 2006).

As set forth by plaintiff in her reply memorandum, she previously sought this information from Defendant City of North Myrtle Beach via Rule 33 and Rule 34. Any dissatisfaction with responses to requests under Rule 33 and Rule 34 is properly addressed under Rule 37. Plaintiff should not circumvent the rules of procedure by use of Rule 45. Accordingly, her request for a Rule 45 subpoena to be issued to Defendant City of North Myrtle Beach is denied. Likewise, plaintiff's request for a subpoena to be issued to defendants' law firm should be denied. Defendants' counsel is subject to Rule 11. If defendants' counsel has possession of any such document or tangible thing and has not produced it or disclosed it in a privilege log, counsel subjects themselves to sanctions.

Again, as stated by plaintiff, requests have been submitted pursuant to Rule 33 and Rule 34 and Rule 45 is not the mechanism to compel further disclosure. The court has the

inherent power to supervise and control the proper and orderly administration of litigation. The Plaintiff has submitted a request for Rule 45 subpoenas to Cathy E. Maddock. It appears that plaintiff seeks documents or tangible things of Mr. Maddock, deceased, in Mrs. Maddock's possession. The language used by plaintiff broadly and vaguely restricts the request to documents or tangible things "relating to these cases." The Clerk of Court is directed to provide a signed subpoena in blank and forward it to the plaintiff. Plaintiff shall complete the subpoena requesting documents and tangible things, in accordance with Rule 26, Fed.R.Civ.P, and addressed to Cathy E. Maddock, and have it served in accordance with the Federal Rules of Civil Procedure.

Plaintiff filed a motion for witness subpoenas (Document # 121) seeking nine subpoenas signed by the clerk of court. Plaintiff fails to indicate to whom she intends to subpoena and how it relates to these cases. Plaintiff may resubmit her request indicating to whom she intends to address the subpoenas and

how it relates to her cases.

Based on the foregoing,

1. Plaintiff's motion to disqualify counsel (**Document # 75 - 4:06-1873**) is denied;

2. Plaintiff's motion to compel (**Document # 99 - 4:06-1873**) is granted in part, denied in part.

3. Plaintiff's motion to extend time (**Document # 91 - 4:06-1873**) is granted.

4. Defendant's motion to file a surreply (**Document # 93 - 4:06-1873**) is granted.

5. Plaintiff's Motions for Subpoenas (**Documents # 117 & # 121 - 4:06-1873; Documents # 16 & # 20 - 4:07-1636**) are granted in part, denied in part.

6. Plaintiff's motion to quash (**Document # 124 - 4:06-1873**) is denied.

7. Defendants' motion for relief from Rule 26 obligations (**Document # 26 - Case No. 4:07- 1636**) is granted in part, denied in part.

AND IT IS SO ORDERED.

March 18, 2008
Florence, South Carolina

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

JOYCE E. ROWLEY, Plaintiff, -vs- CITY OF NORTH MYRTLE BEACH, and JOHN SMITHSON, City Manager; JOEL DAVIS, Assistant City Manager; KEVIN BLAYTON, Public Works Director, individually and in their representative capacities as employees of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR for the City of North Myrtle Beach; and CATHY E. MADDOCK as Personal Representative of the Estate of Douglas Maddock; Defendants.	Civil Action No.: 4:06- 1873-TLW-TER 4:07-1636-TLW-TER **ORDER**

I. INTRODUCTION

Presently before the Court are seventeen motions: Motion

to Substitute Party (Document # 34, 129)[1] , Motion to Amend/Correct Order on Motion to Consolidate (Document # 35, 130), Motion for Extension of Time (Document # 39, 134), Motion to Quash and Renewed Motion for Disqualification of Counsel (Document # 57, 154), Motion for Protective Order (Document # 69,170), Motion to Compel and/or for Sanctions (Document # 72, 173), Motion to Compel (Document # 74, 175), Motion to Amend/Correct Complaint (Document # 78, 179), Motion to Quash (Document # 81, 182), Motion to Compel (Document # 83, 184), Corrected Motion to Amend/Correct Complaint (Document # 86, 187), Motion to Compel and for Extension of Time (Document # 89, 191), Motion to Excuse Plaintiff from Participation in Mediation (Document # 94,196), Motion for Confidentiality Order (Document # 109, 212), Motion to Strike (Document # 110,213) and Motion for Reconsideration (Document # 111, 214)[2]. A

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[1]The first number listed reflects the document number in 4:07-1636, the lead case. The second number reflects the document number in 4:06-1873.

[2]Other Motions are pending that are not yet ripe for review. In addition, Defendants' Motion to Dismiss or for

hearing was held on May 8, 2008. [2]

Plaintiff, appearing pro se, was present on her behalf and Christopher Johnson, Esquire, was present on behalf of all defendants. The undersigned ruled on several motions from the bench and reserved rulings on other motions. Each motion will be addressed below.

(***Petitioner's Note: Those motion decisions which were appealed are excerpted below as a matter of brevity.)***

B. Motion to Amend/Correct Order on Motion to Consolidate (Document # 35, 130)

In this Motion, Plaintiff requests the undersigned to add the following language to the Order on Motion to Consolidate:

> In the opinion of the Court this order involves a controlling question of law as to which there is substantial ground for difference of opinion, and an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Sanctions (Document # 65, 165) is also pending. Out of an abundance of caution, a Report and Recommendation will be prepared on this Motion for review by the District Judge. See 28 U.S.C. § 636(b)(1)(A) and (B) and Local Rule 73.02(B)(2)(e),DSC.

Motion to Amend/Correct at 1. This motion is denied as stated on the record.

H. Motion to Quash (Document # 81, 182), Motion to Compel and for Extension of Time (Document # 89, 191)

Plaintiff files a motion to quash her deposition as noticed by Defendants. On December 14, 2007, Defense counsel noticed Plaintiff's deposition for January 22, 2008. On December 17, 2008, Defense counsel sent an Amended Notice of Deposition, informing Plaintiff that the deposition would be recorded by video tape[6]. Plaintiff objects to this method of recording, arguing that it is an attempt by defense counsel to intimidate and harass her.

Defendants argue that the need for videotaping Plaintiff's deposition became apparent following her conduct during the Blust deposition.[7]

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[6]Defendants sent a Second Amended Notice of Deposition on December 31, 2007, changing the deposition date to January 24, 2008.

[7]Indeed, after reviewing the Blust deposition transcript, but prior to reviewing the present motion, the undersigned contemplated requiring that all further depositions be recorded

Rule 30(b)(2), Fed.R.Civ.P., states that "the party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means . . . ." There appears to be no limitation on Defendants' right to record Plaintiff's deposition by videotape. A party noticing a deposition "has no burden to justify the decision to videotape the deposition." Drake v. Benedek Broadcasting Corp., No. Civ.A. 99-2227, 2000 WL 156825, at *1 (D.Kan. Feb.9, 2000) (citation omitted). However, the court in Drake, also noted that

> The Advisory Committee Notes recognize that objections to the non-stenographic recording of a deposition, "when warranted by the circumstances," may be presented to the court under Fed.R.Civ.P. 26(c). That rule authorizes protective orders against annoyance, embarrassment, oppression, and undue burden or expense. The party seeking to prevent the videotaping has the burden to show that one or more of the above reasons exist.

Id. (citing Wilson v. Olathe Bank, 184 F.R.D. 395, 397-98 (D.Kan.1999)). But see Ward v.LeClaire, 2007 WL 2687671 at *2

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by videotape to have a clear record of the proceedings. ____

(N.D.N.Y. September 10, 2007) (stating "there is no basis for Plaintiff to object to the [recording] method originally selected by the party noticing the deposition, provided it is in accordance with Rule 30(b)(2)"). Plaintiff has not met her burden of establishing that Defendants intend to videotape her deposition to annoy, embarrass, or oppress her. Furthermore, under Rule 30(b)(2), Defendants are responsible for the cost of the recording, so it will cause no undue burden or expense for Plaintiff. Accordingly, Plaintiff's Motion to Quash is denied.

Defendants file a motion to compel Plaintiff to attend her deposition and for an extension of the discovery deadline for the purpose of taking Plaintiff's deposition. Defendants noticed Plaintiff's deposition for January 24, 2008, a date which Plaintiff indicated she believed she would be available. Three days prior to the date scheduled for the deposition, Plaintiff contacted defense counsel and informed him that she would not be able to attend the deposition due to work obligations. Plaintiff then filed the motion to quash discussed above.

The discovery deadline in this case was February 1, 2008. Defendants' Motion was filed February 6, 2008. Plaintiff argues that Defendants' motion must fail because it was not timely filed. Rule 16(b), Fed.R.Civ.P., provides, inter alia, that "[a] schedule shall not be modified except upon a showing of good cause and by leave of the district judge or, when authorized by local rule, by a magistrate judge." In Dilmar Oil Co., Inc. v. Federated Mutual Insurance Co., 986 F.Supp. 959,980 (D.S.C. 1997), this court discussed the "good cause" standard of Rule 16(b):

> Rule 16(b)'s "good cause" standard is much different than the more lenient standard contained in Rule 15(a). Rule 16(b) does not focus on the bad faith of the movant, or the prejudice to the opposing party. Rather, it focuses on the diligence of the party seeking leave to modify the scheduling order to permit the proposed amendment. Properly construed, "good cause" means that scheduling deadlines cannot be met despite a party's diligent efforts. In other words, this court may modify the scheduleon a showing of good cause if the deadline cannot be met despite the diligence of the party seeking the extension. Carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief.Dilmar, 986 F.Supp. at 980.

The undersigned finds that Defendant's actions in this case have not been careless as contemplated by Rule 16(b). In fact, Defendants still have not received all of the discovery from Plaintiff. Defendants noticed Plaintiff's deposition prior to the close of discovery, and Plaintiff cancelled three days prior to the scheduled deposition. Thus, Defendants motion is granted. The discovery deadline will be extended to allow Defendants to take Plaintiff's deposition. Defendants shall do so within 30 days of the date of this order. The deadline for dispositive motions will be set for thirty days beyond that date. A separate Amended Scheduling Order is being entered along with this Order.

I. Motion to Compel and for Sanctions (Document # 83, 184)

Plaintiff challenges the sufficiency of Defendants' responses to her discovery requests in this Motion. At the hearing, she was able to narrow her requests to City Interrogatory # 6 and City Interrogatory # 14.

City Interrogatory # 6 reads as follows: "Identify by name and position all persons involved in the decision to terminate

Plaintiff. Include the date the decision was made, whether attorneys were consulted and when, and name all counsel who advised Defendant City in this decision." Defendants answered: "Defendant objects to this interrogatory to the extent that it seeks information protected by the attorney-client privilege or the work-product privilege. Without waiving the objection, Defendant responds that Defendant Smithson discussed Plaintiff's termination with Defendant Davis and with the City's legal counsel."

Defendant Smithson's discussions with Defendant Davis are not protected by the attorney client privilege. Furthermore, generally, the identity of the City's legal counsel and when he or she was consulted are not protected either. See Fisher v. United States, 425 U.S. 391, 403 (1976) (holding that the privilege applies only to "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance"). Defendants fail to show the applicability of privilege to this information. Thus, Defendant City should supplement its response by including when the decision

was made to terminate Plaintiff, when legal counsel was consulted, and the identity of the legal counsel consulted.

City Interrogatory # 14 reads as follows: "Regarding the position papers of October 6, 2005, December 2, 2005, and February 14, 2006, to the Equal Employment Opportunity Commission, identify Defendant City's role in preparing and approving the letters and attachments. This response should include a list identifying all persons who assisted, prepared in, or otherwise provided materials for these documents." Defendants answered: "Defendant objects to this Interrogatory on the basis that it seeks to invade the attorney-client privilege and/or the work product doctrine and is not reasonably calculated to lead to the discovery of relevant evidence."

Plaintiff complains that Defendants failed to produce a privilege log in connection with the above interrogatories. Defendants assert that a privilege log is not required for responses to interrogatories, only for responses to requests for production of documents.

Rule 26(b)(5)(A), Fed.R.Civ.P. provides:

> When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

Although the language of the rule does not specifically refer to a privilege log, many courts read Rule 26(b)(5)(A) to require a party asserting a privilege to produce a privilege log describing the documents withheld. See, e.g., United Investors Life Ins. Co. v. Nationwide Life Ins. Co., 233 F.R.D. 483, 486 (N.D.Miss. 2006). Regardless of whether the privilege log requirement applies to privileges asserted in response to a party's interrogatories, the rules do require that the grounds for any objection based on privilege be stated with specificity to allow the party requesting the information to assess the applicability of the privilege.

Within fifteen days of the date of this order, Defendants

should provide Plaintiff with sufficient information regarding the privilege asserted over City Interrogatory # 14 in accordance with Rule 26(b)(5)(A). If, after receiving the information from Defendant City, Plaintiff still believes that the information is not privileged, she may file a Motion to Compel within 30 days of the date of this Order.

III. CONCLUSION

For the reasons stated above, Motion to Substitute Party (Document # 34, 129) is **GRANTED**, Motion to Amend/Correct Order on Motion to Consolidate (Document # 35, 130) is **DENIED**, Motion for Extension of Time (Document # 39, 134) is **GRANTED**, Motion to Quash and Renewed Motion for Disqualification of Counsel (Document # 57, 154) is **MOOT** in part and **DENIED** in part, Motion for Protective Order (Document # 69, 170) is **DENIED** in part and **GRANTED** in part, Motion to Compel and/or for Sanctions (Document # 72, 173) is **GRANTED** in part and **DENIED** in part, Motion to Compel (Document # 74, 175) is **GRANTED** in part and **DENIED** in part, Motion to

Amend/Correct Complaint (Document # 78, 179) is **GRANTED**, Motion to Quash (Document # 81, 182) is **DENIED**, Motion to Compel (Document # 83, 184) is **GRANTED** in part, Corrected Motion to Amend/Correct Complaint (Document # 86, 187) is **GRANTED**, Motion to Compel and for Extension of Time (Document # 89, 191) is **GRANTED**, Motion to Excuse Plaintiff from Participation in Mediation (Document # 94, 196) is **DENIED**, Motion for Confidentiality Order (Document # 109, 212) is **GRANTED**, Motion to Strike (Document # 110, 213) is **MOOT** and Motion for Reconsideration (Document # 111, 214) is **GRANTED.**

IT IS SO ORDERED.

s/Thomas E. Rogers, III
Thomas E. Rogers, III
United States Magistrate Judge

May 30, 2008
Florence, South Carolina

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

Joyce Rowley, Plaintiff,	)	C.A. No. 4:06-1873-TLW- TER
	)	C.A. No. 4:07-1636-TLW- TER
vs.	)	
City of North Myrtle Beach, and John Smithson, City Manager; Joel Davis, Assistant City Manager; Kevin Blayton, Public Works Director, individually and in their representative capacities as employees of the City of North Myrtle Beach; Planning and Development Director for the City of North Myrtle Beach; and Cathy E. Maddock as Personal Representative of the Estate of Douglas Maddock, Defendants.	)	**ORDER**

This matter comes before the Court on plaintiff's "Objections to Order, Doc. # 131" with respect to the May 30, 2008 Order of the Magistrate Judge. In his May 30, 2008 Order, the Magistrate Judge addressed a number of outstanding pre-

trial motions pending in the above captioned case. (Doc. # 131). Plaintiff has objected to some of the rulings contained in that Order, specifically as to: (1) the ruling that her motion to quash be denied and defendant's motion to compel her deposition be granted (Doc. # 81 and Doc. # 89); (2) the ruling that plaintiff's motion to compel be granted in part (Doc. # 83); (3) the ruling that plaintiff's 3rd Motion to Compel and for sanctions rd be granted in part (Doc. # 72); the ruling that defendants' motion to dismiss for failure to prosecute claims and for sanctions remain pending (Doc. # 65); and the ruling that plaintiff's motion to amend Interlocutory Order be denied (Doc. # 35).

Fed.R.Civ.P. 72(a) provides as follows:

When a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide, the magistrate judge must promptly conduct the required proceedings and, when appropriate, issue a written order stating the decision. A party may serve and file objections to the order within 10 days after being served with a copy. A party may not assign as error a defect in the order not timely objected to. The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law.

As argued by defendant's in their response to plaintiff's

objections, review of a magistrate judge's decision on non-dispositive matters such as discovery is deferential, and a magistrate judge's order on such issues will only be set aside if "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a); *see also*, 28 U.S.C. § 636 (b)(1)(A). "The Federal Rules of Civil Procedure provide magistrate judges with broad discretion in resolving discovery disputes." *Clark v. Milam*, 155 F.R.D. 546, 547 (S.D. W.Va. 1994) (internal quotation and citation omitted). "A court's 'finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'" *Sharer v. Tandberg, Inc.*, 2007 WL 433152, *2 (E.D. Va. 2007) (slip copy attached) (quoting, *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Accordingly, "[a]ltering a magistrate's non-dispositive orders is extremely difficult to justify." *Id.* (citing, 12 Wright & Miller, Federal Practice and Procedure § 3069 (2d ed.1997)).

After careful review of the record in this case, the May 30, 2008 Order of the Magistrate Judge, plaintiff's objections to said Order and defendant's response thereto, as well as the applicable law, this Court cannot conclude that any part of the Order objected to is clearly erroneous or is contrary to law.

IT IS SO ORDERED.

s/ Terry L. Wooten
Terry L. Wooten
United States District Court Judge

June 25, 2008
Florence, South Carolina

APPENDIX C

ORDER OF THE FOURTH CIRCUIT COURT OF APPEALS DENYING PETITION FOR REHEARING

FILED: November 17, 2008

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 08-1773
(4:06-cv-01873-TLW-TER)
(4:07-cv-01636-TLW-TER)

JOYCE E. ROWLEY,

Plaintiff - Appellant

v.

CITY OF NORTH MYRTLE BEACH; JOHN SMITHSON, City Manager, individually and in his representative capacity as employee of the City of North Myrtle Beach; JOEL DAVIS, Assistant City Manager, individually and in his representative capacity as employee of the City of North Myrtle Beach; KEVIN BLAYTON, Public Works Director, individually and in his official capacity as employee of the City of North Myrtle Beach; PLANNING AND DEVELOPMENT DIRECTOR FOR THE CITY OF NORTH MYRTLE BEACH; CATHY E. MADDOCK, Personal Representative of the Estate of Douglas Maddock,

Defendants - Appellees

and

DOUGLAS MADDOCK, Planning and Development Director individually and in his representative capacity as employeeyof the City North Myrtle Beach,

Defendant

ORDER

The Court denies the petition for rehearing.

Entered at the direction of the panel: Judge King, Judge Gregory, and Judge Agee.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D

PROVISIONS OF LAW CITED

CONSTITUTIONAL AMENDMENTS
UNITED STATES CODE

FEDERAL RULES OF CIVIL PROCEDURE
LOCAL RULES OF CIVIL PROCEDURE

STATE LAW

CONSTITUTIONAL AMENDMENTS

FIRST AMENDMENT TO THE CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTEENTH AMENDMENT TO THE CONSTITUTION

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the

several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member

of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

UNITED STATES CODE

28 United States Code §1291. Final decisions of the district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals of the Federal Circuit shall be limited to the jurisdiction described in Section 1292 (c) and (d) and 1295 of this title.

42 United States Code § 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

FEDERAL RULES OF CIVIL PROCEDURE

Rule 1. Scope and Purpose of Rules

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action. (As amended Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 22, 1993, eff. Dec. 1, 1993.)

Rule 4. Summons

(a) FORM. The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or, if unrepresented, of the plaintiff. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result

in a judgment by default against the defendant for the relief demanded in the complaint. The court may allow a summons to be amended.

(b) ISSUANCE. Upon or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is in proper form, the clerk shall sign, seal, and issue it to the plaintiff for service on the defendant. A summons, or a copy of the summons if addressed to multiple defendants, shall be issued for each defendant to be served.

Rule 15. Amended and Supplemental Pleadings

(a) AMENDMENTS. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given

when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

(c) RELATION BACK OF AMENDMENTS. An amendment of a pleading relates back to the date of the original pleading when (1) relation back is permitted by the law that provides the statute of limitations applicable to the action, or

(2) the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, or

Rule 45. Subpoena

(a) FORM; ISSUANCE.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service.

Rule 55. Default

(a) ENTRY. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter the party's default.

LOCAL CIVIL RULES for the UNITED STATES DISTRICT COURT DISTRICT OF SOUTH CAROLINA

(with revisions through March 2008)

MOTIONS FOR EXTENSION, ENLARGEMENT, OR SHORTENING OF TIME

6.01: *Motion for Enlargement or Shortening of Time, Extension of Discovery.* Any application, including a proposed consent order, for enlargement or shortening of time (except as otherwise allowed by consent under Local Civil Rules 12.01, 29.01, and 37.01) must be accompanied by an affidavit or other statement giving the reasons therefor.

Motions for extension should also include the following information: (1) the date of the current deadline; (2) whether the deadline has previously been extended; (3) the number of additional days requested, as well as the proposed date of the new deadline; and (4) whether the extension requested would affect other deadlines. A proposed amended scheduling order in

the form used by the assigned judge, including all deadlines not then expired, shall be attached to the motion. Motions for extension of time for completion of discovery will be granted only in unusual cases and upon a showing that the parties have diligently pursued discovery during the originally specified period. This showing requires a specification of the discovery (including depositions by witness name and date) which has been completed and the depositions (including witness name) and other discovery which remain to be completed.

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1 2.01 : *Extensions of Time to Respond to a Pleading.*

One extension in writing may be granted by a party to respond to an original or amended pleading in which a claim is asserted, provided the extension does not exceed the lesser of twenty (20) days or the number of days within which the response was originally due. *See also* Local Civil Rules 6.01 (Motions to Enlarge or Shorten Time), 29.01 (Modifications of Discovery

Procedures), and 37.01 (Motions to Compel Discovery).

16.02: *Scheduling Conference and Scheduling Order.*

(D) Timeliness of Requests and Disclosures.

(1) Discovery requests are timely if served in time for the response to be served within the discovery deadline set by the scheduling order.

(2) Witnesses who are not timely identified may be excluded. All witnesses should be identified as early in the discovery process as is feasible. Witnesses identified within the last thirty (30) days of the discovery period will be presumed not to be timely identified, absent a showing of good cause.

29.01: *Modifications of Discovery Procedure.*

Where these Local Civil Rules or the Federal Rules of Civil Procedure allow modifications by written stipulation of discovery procedures or limitations (i.e., Fed. R. Civ. P. 26 and 29), the stipulation may be accomplished by correspondence. The procedural modifications may include the granting of an

extension of time to respond to written discovery requests, but no extension may place the due date less than thirty (30) days before the end of the discovery period. See also Local Civil Rule 37.01. Note, however, that Fed. R. Civ. P. 29 specifically prohibits stipulations extending the time for responding to discovery "if [the extension] would interfere with any time set for completion of discovery, for hearing of a motion, or for trial." The latter may be made only with approval of the Court. See also Local Civil Rules 6.01 and 37.01.

FAILURE TO MAKE DISCLOSURE OR COOPERATE IN DISCOVERY: SANCTIONS

37.01: *Motion to Compel Discovery.*

(A) Timeliness of Motion. Motions to compel discovery must be filed within twenty (20) days after receipt of the discovery response to which the motion to compel is directed or, where no response has been received, within twenty (20) days after the response was due. If counsel are actively engaged in attempts to

resolve the discovery dispute, they may agree to extend the time to comply with the discovery request so long as the extension does not place the due date beyond thirty (30) days before the deadline for completion of discovery as set by the scheduling order. See also Local Civil Rule 29.01 (Modifications of Discovery Procedure). This extension will automatically extend the deadline for the motion to compel by an equal amount of time. The extension shall be confirmed in writing.

In the event a later motion to compel is filed, the correspondence confirming the extension shall be attached.

(B) Memoranda and Hearings. Motions to compel discovery shall be filed in compliance with Local Civil Rule 7.04. The relevant discovery requests and responses, if any, shall be filed as supporting documentation. Motions to compel may be heard at the discretion of the Court.

37.02: *Sanctions.*

[Deleted effective December 1, 2000]

United States District Court of South Carolina

"Information on Representing Yourself in a Civil Action"

Revised to 8/22/06

Subpoenas

THE CLERK OF COURT CANNOT GIVE *PRO SE* PARTIES BLANK SUBPOENAS. If you want the court to issue subpoenas, you must submit a motion explaining who you want to subpoena[1] and why. Please file the motion at least two weeks before you will need the subpoenas. You will need to have the subpoena served in accordance with FRCP Rule 45.

Expenses related to the subpoena, such as witness fees, mileage costs, and copying costs, are to be paid by the person requesting the subpoena. *See* FRCP Rule 45.

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[1]A subpoena is a command to appear at a certain time and place to give testimony upon a certain matter. A subpoena duces tecum requires production of books, papers, and other things.

SOUTH CAROLINA CODE OF LAWS

CHAPTER 78.

SOUTH CAROLINA TORT CLAIMS ACT

(Excerpted for brevity)

SECTION 15-78-10. Short title.

This chapter may be cited as the "South Carolina Tort Claims Act".

SECTION 15-78-100. When and where to institute action; requirement of special verdict specifying proportionate liability of multiple defendants.

(a) Except as provided for in Section 15-3-40, an action for damages under this chapter may be instituted at any time within two years after the loss was or should have been discovered. Provided, that if a claim for damages was filed and disallowed or rejected an action for damages filed under this chapter, based upon the same occurrence as the claim, may be instituted within three years after the loss was or should have been discovered.

(b) Jurisdiction for any action brought under this chapter is in the circuit court and brought in the county in which the act or omission occurred.

(c) In all actions brought pursuant to this chapter when an alleged joint tortfeasor is named as party defendant in addition to the governmental entity, the trier of fact must return a special verdict specifying the proportion of monetary liability of each defendant against whom liability is determined.

SECTION 15-78-110. *Statute of limitations.*

Except as provided for in Section 15-3-40, any action brought pursuant to this chapter is forever barred unless an action is commenced within two years after the date the loss was or should have been discovered; provided, that if the claimant first filed a claim pursuant to this chapter then the action for damages based upon the same occurrence is forever barred unless the action is commenced within three years of the date the loss was or should have been discovered.